

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DAVID A. BISMACK,

Plaintiff,

v.

Case No. 07-13406

MICHAEL ASTRUE, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

**ORDER ALLOWING PLAINTIFF TO APPLY FOR FEES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Before the court is Plaintiff David A. Bismack's November 12, 2008, "Petition for Attorney Fees Under the Equal Access to Justice Act (EAJA)," filed some twenty-three days late due to an administrative oversight in Plaintiff's counsel's office. Defendant Commissioner of Social Security filed a response suggesting that the court should simply bar the application as untimely and reserving comment on its substantive merits. Plaintiff's counsel has acknowledged the lateness of the application, but also has submitted an affidavit attesting that the delay is an unusual circumstance, being indeed the first time she has missed such a deadline.

The Sixth Circuit recognizes that a district court has discretion to make equitable tolling determinations on a case-by-case basis for purposes of EAJA fees. *Townsend v. Soc. Sec. Admin.*, 486 F.3d 127, 132 (6th Cir. 2007). The Sixth Circuit provides a number of factors for the district court's consideration, primarily regarding notice, prejudice to the opposing party, and the diligence of the prevailing party. *Id.* Under the

particular circumstances in the instant case, the court will allow Plaintiff to submit his application even though the time for doing so has passed, particularly because Plaintiff's application requests EAJA fees for a remand stipulated to by the parties. (Pl.'s Pet. at 2.) Additionally, Plaintiff has not intentionally engaged in dilatory tactics during the prosecution of this case, and little, if any, prejudice will accrue to Defendant. For the foregoing reasons,

IT IS ORDERED that Defendant submit a supplemental response on the merits of Plaintiff's "Petition for Attorney Fees Under the Equal Access to Justice Act (EAJA)" by **January 9, 2009**.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: December 23, 2008

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, December 23, 2008, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522